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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 722

STANDARD DREDGING CORPORATION, EMPLOYER,
Appellant,

vs.

FRIEDA S. MILLER, INDUSTRIAL COMMISSIONER, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION.

H. MAURICE FRIDLUND,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

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No. 722

STANDARD DREDGING CORPORATION, EMPLOYER, *Appellant,*

vs.

FRIEDA S. MILLER, INDUSTRIAL COMMISSIONER; MIKE CASSARETAKIS

JURISDICTIONAL STATEMENT PURSUANT TO RULE 12 OF THE RULES OF THE UNITED STATES SUPREME COURT.

I.

The Supreme Court of the United States has jurisdiction to review on appeal the final order here in question, under Section 237 (a) of the Judicial Code (28 U. S. C. A. 344), by reason of the fact that there is here drawn in question the validity of the New York Unemployment Insurance Law, Labor Law, Article 18 (Chapter 31 of the New York Consolidated Laws), on the ground that said statute, as applied to maritime employment, is repugnant to Article III, Section 2 of the Constitution of the United States and the

decision herein of the State Court is in favor of its validity as so applied.

The New York Unemployment Insurance Law provides for the establishment of a fund, which is administered by the State Industrial Commissioner, for the payment of benefits to qualified employees upon becoming unemployed. Contributions to such fund are obtained by the State through a levy upon employers measured by a percentage of the payroll and is assessed upon all employers generally with certain exceptions not here material. The law does not expressly except from its coverage maritime employment. In this cause, it has been held to apply to such employment.

The final order of the Court of Appeals of the State of New York sought to be reviewed herein was made on the 15th of October, 1942, and the remittitur of said Court of Appeals was filed in the Appellate Division of the Supreme Court of the State of New York, Third Department, on October 22, 1942.

The application for appeal in support of which this statement is made was presented on December 30, 1942.

II.

This case involves the authority of the State of New York to bring maritime employment within the coverage of its Unemployment Insurance Law in violation of Article III, Section 2 of the Constitution of the United States.

The attempt by a State to apply a statute, otherwise valid, beyond the proper jurisdiction of the State under the Constitution of the United States, to that extent draws in question the validity of such statute and a final judgment or decree of the State court may properly be reviewed on appeal by the Supreme Court of the United States. *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94.

III.

The Questions Here Involved Are Substantial.

Prior to the decision of the Court of Appeals in this case and certain companion cases decided by that court at the same time, every State in the Union had exempted officers and members of crews of vessels on navigable waters, 45 by specific statutory exemption, and the other 3 (including New York) by administrative ruling. In New York State, the Attorney General rendered an opinion in 1936 which held that the New York Unemployment Insurance Law could not be constitutionally applied to members of a crew of a documented vessel on the authority of the cases of *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, and *State of Washington* v. *Dawson*, 264 U. S. 219.

Thus it appears that heretofore the several States have voluntarily and unanimously recognized that the essential uniformity of maritime law would be invaded if State unemployment insurance laws were applied to maritime employment.

The question here involved necessarily affects the entire field of maritime operations.

If the final order of the State Court herein is sustained, employers who have been engaged in maritime operations within the territorial jurisdiction of the State of New York will be liable for contributions to the New York unemployment insurance fund, not only in the future but also for the period of approximately seven years since the enactment of the New York Unemployment Insurance Law, in addition to interest and penalties for having failed to make such contributions.

Employees engaged in maritime employment are vitally affected by the questions here involved, for if the United States Supreme Court on review of the appeal herein

should determine that there is no constitutional prohibition against the coverage of maritime employment under State unemployment insurance laws, the several States will undoubtedly amend their laws to cover such employment, with the result that maritime employees will be entitled to receive unemployment benefits under such laws.

A further question of considerable importance to the maritime field is here involved, namely, whether a person, such as the claimant herein, concededly employed as a cook aboard a dredge documented under the laws of the United States, is a member of the crew of a vessel. The New York Court of Appeals has here held, contrary to well established precedent, that this question is one of fact and not of law. That a cook aboard a documented vessel is a member of the crew as a matter of law has been heretofore well recognized.

Maryland Casualty Co. v. *Lawson*, 94 F. (2d) 190;
The Marie, 49 Fed. 286;
The Yacht Revenge, 1940 AMC 510.

Furthermore, the Federal Courts have consistently held that dredges are "vessels" engaged in navigation, maritime transportation and commerce.

The Dredge Alabama, (D. C. Ala., 1884), 19 Fed. 544, aff'd (C. C. A. 5th) 22 Fed. 449, (holding a dredge to be a vessel engaged in and having direct relation to commerce and navigation);

Saylor v. *Taylor*, (C. C. A. 4th, 1896), 77 Fed. 476;

Ellis v. *United States*, (1907), 206 U. S. 246;

Warren & Arthur Smadbeck, Inc. v. *Helvering Contracting Corp.*, (C. C. A. 2nd, 1931), 50 F. (2d) 99, (dredge chartered to build new land with dredged material);

Kibadeaux v. *Standard Dredging Co.*, (C. C. A. 5th, 1936), 81 F. (2d) 670; cert. den. 299 U. S. 549, (modern hydraulic dredge pumping dredged material through pipe lines over pontoons to shore);

Maryland Casualty Co. v. *Lawson*, (C. C. A. 5th, 1938), 94 F. (2d) 190, 192;

Woods Bros. Construction Co. v. *Iowa Unempl. Comp. Div.*, (Feb. 11, 1941), 229 Iowa 1171, 296 N. W. 345 (barge).

The Supreme Court of the United States has on numerous occasions held that, in the absence of some controlling statute, which is the situation here, the general maritime law as accepted by the Federal Courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction.

The Lottawanna, 21 Wall. 558;
Butler v. *Boston & Savannah Steamship Co.*, 130 U. S. 527, 557;
Workman v. *New York City*, 179 U. S. 552;
Southern Pacific Co. v. *Jensen*, 244 U. S. 205, 215.

IV.

The Federal question sought to be reviewed on this appeal was raised in the first instance in connection with the hearing conducted by the Referee appointed by the Industrial Commissioner. In its brief submitted at the close of the hearing, the appellant argued that maritime employment was not covered by the New York Unemployment Insurance Law, but that if it did cover such employment it was unconstitutional and void. In support of this contention, appellant cited an official ruling rendered in 1936 to the New York State Labor Department by the New York Attorney

General (1936 Op. At. Gen. 268) which held that the New York Unemployment Insurance Law did not, and could not constitutionally, be applied to cover officers and members of the crew of a vessel documented under the laws of the United States operating within the geographical limits of the State of New York. Reliance was also placed by appellant on an earlier decision (Case 2552-40) of the New York Unemployment Insurance Appeal Board in which the Board stated:

> "It is the opinion of this Board that Congress, in enacting the exemption in the Social Security Act for officers and members of a crew of a vessel, asserted its exclusive jurisdiction over that group. The states thereby were divested of their jurisdiction to legislate with reference to officers and members of a crew of a vessel."

Upon appeal to the New York Unemployment Insurance Appeal Board from the decision of the Referee which held that the claimant's employment, even though maritime, was covered by the New York Unemployment Insurance Law (Record, pp. 9-15), the appellant specified as the grounds of its appeal, among others, (1) that claimant was employed as a member of the crew of a vessel, documented under the laws of the United States, on navigable waters of the United States, (2) that claimant's employment was maritime in nature and subject to the exclusive jurisdiction of the Federal Government, (3) that, in the exercise of said exclusive jurisdiction, the Federal Government exempted such employment from the provisions of the Social Security Act, (4) that such employment was not covered by the New York State Unemployment Insurance Law, and (5) that, if such employment was intended to be so covered, the law is unconstitutional and void (Record, pp. 8-9).

The Appeal Board rendered a decision which affirmed the decision of the Referee and adopted as its own the Referee's findings of fact and conclusions of law (Record, pp. 5-6).

The employer, appellant here, appealed to the Appellate Division of the Supreme Court of the State of New York, Third Department, from the decision of the Appeal Board, and from each and every part thereof (Record, p. 3).

The Appellate Division, in a memorandum decision (Record, pp. 153-154), reversed the decision of the Appeal Board and stated:

> "Clearly, claimant, a cook, was a member of the crew of a documented vessel operating on navigable waters. The dredge was licensed and enrolled as a vessel of the United States. Accordingly, claimant is not subject to the jurisdiction of the Unemployment Insurance Law but is subject solely in respect of the matter in controversy here to the admiralty and maritime jurisdiction of the United States (Article III, Section 2, Constitution of the United States).
>
> "The grant of admiralty jurisdiction to the Federal government was intended to commit direct control and to relieve maritime commerce of unnecessary burdens by reason of discordant legislation of the several states. (Knickerbocker Ice Co. v. Stewart, 253 U. S. 149.)"

In further support of its decision, the Appellate Division referred to the provisions of Section 907 (c)(3) of Title IX of the Federal Social Security Act (Section 1607 (c)(4), Internal Revenue Code) which expressly excepts from the term "employment" services performed as an officer or member of the crew of a vessel on the navigable waters of the United States (Record, p. 154).

The New York State Industrial Commissioner appealed to the Court of Appeals from the order entered on the decision of the Appellate Division (Record, p. 149).

In its decision rendered on October 15, 1942, the Court of Appeals reversed the order of the Appellate Division

and affirmed the determination of the Unemployment Insurance Appeal Board. Thereafter, the remittitur from the Court of Appeals, the order of reversal of that Court, was made the order of the Appellate Division, Third Department, by order entered herein on October 22, 1942.

In its decision, reported in 289 N. Y. 119, the Court of Appeals held:

(a) That whether claimant, concededly a cook aboard a documented dredge operating on the navigable waters of the United States, was a member of the crew of a vessel, was solely a question of fact.

(b) That there is no constitutional objection to the coverage of maritime employments by the New York Unemployment Insurance Law.

(c) That, while Congress has the constitutional right to exclude maritime employments from coverage by State unemployment insurance, it did not do so by the enactment of Section 1607 (c)(4) of the Internal Revenue Code which excludes from the coverage of the Federal Social Security Act, officers and members of the crew of a vessel on the navigable waters of the United States.

There are appended hereto copies of the opinion of the Court of Appeals, the memorandum decision of the Appellate Division of the New York Supreme Court, Third Department, and the opinions of the New York Unemployment Insurance Appeal Board and the Referee.

Conclusion.

This is a proper case for the allowance of an appeal to the Supreme Court of the United States.

H. Maurice Fridlund,
Counsel for Appellant.

APPENDIX "A".

In the Matter of the Claim of MIKE CASSARETAKIS.

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, Appellant.
STANDARD DREDGING CORPORATION, Respondent.

In the Matter of the Claim of JOSEPH BERGEN.

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, Appellant.
INTERNATIONAL ELEVATING COMPANY, Respondent.

In the Matter of the Claim of JAMEL SHEREDOS.

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, Appellant.
LAKE TANKERS CORPORATION, Respondent.

In the Matter of the Claim of JAMES R. KNOWLSON.

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, Appellant.
MATTON STEAMBOAT CO., INC., et al., Respondents.

In the Matter of the Claim of DAVID SCHEIN.

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, Appellant.
FAIR WATER TRANSPORTATION CO., INC., Respondent.

In the Matter of the Claim of FRED A. SMITH.

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, Appellant.
BEN FRANKLIN TRANSPORTATION CO., INC., Respondent.

Argued June 15, 1942; decided October 15, 1942.

Appeal, in the first and second above-entitled proceedings, from orders of the Appellate Division of the Supreme Court in the third judicial department, entered December 1, 1941, and December 10, 1941, respectively, which reversed decisions of the Unemployment Insurance Appeal Board

determining that the claimants in such proceedings worked in employments subject to the unemployment insurance law (Labor Law, art. 18; Cons. Laws, ch. 31) and were entitled to be credited with their earnings in such employments as a basis for unemployment insurance benefits.

Appeal, in each of the third, fourth, fifth and sixth above-entitled proceedings, by permission, from orders of the same Appellate Division, entered November 19, 1941, which unanimously affirmed decisions of the Unemployment Insurance Appeal Board determining that the claimant in each of such proceedings did not work in an employment subject to the unemployment insurance law (Labor Law, art. 18; Cons. Laws, ch. 31) and was not entitled to be credited with his earnings in such employment as a basis for unemployment insurance benefits.

John J. Bennett, Jr., Attorney-General (Henry Epstein, W. Gerard Ryan and Francis R. Curran of counsel), for appellant.

H. Maurice Fridlund and James Ragan Roberts, for Standard Dredging Corporation, respondent.

Jules Haberman, Arthur E. Goddard and Robert B. Lisle, for International Elevating Company, respondent.

Frank C. Mason and Edward L. P. O'Connor for Conners Marine Co., Inc., et al., respondents.

Edward K. Bachman for Lake Tankers Corporation, respondent.

No appearance for Fair Water Transportation Co., Inc., Respondent.

No appearance for Ben Franklin Transportation Co., Inc., Respondent.

FINCH, J.

These six appeals present the question whether the New York unemployment insurance law (Labor Law, art. 18; Cons. Laws, ch. 31) imposing a pay-roll tax upon all employers of four or more employees, without discrimination and without exception here material, is applicable to marine employments.

In four of the above cases the Unemployment Insurance Appeal Board has found that the claimants had been em-

ployed as members of the crews of vessels on the navigable waters of the United States and for that reason the Board held that they were not covered by the unemployment insurance law. In the two remaining cases (*Matter of Cassaretakis* and Matter of Bergen) the Board has found that the claimants, although engaged in marine employments, had not been employed as members of the crews of vessels on the navigable waters of the United States, and on this basis held that they were covered by the statute in question.

Upon appeal to the Appellate Division, the decision of the Board in the four cases first mentioned above was sustained. In the other two cases, however, the determinations were reversed upon the ground that, by reason of the admiralty clause of the Federal Constitution, the unemployment insurance statute may not be held applicable to maritime employments.

The definition of employment contained in the New York Act (Labor Law, §502) is admittedly sufficiently broad to cover all maritime employments, including service as an officer or member of a crew of a vessel upon navigable waters of the United States, provided the whole or greater part of such employment is performed within this State. The Federal statute (U. S. Code, tit. 26, §1607, subd. c), on the other hand, specifically excludes from the tax levied thereunder services rendered as officer or member of a crew of a vessel upon the navigable waters of the United States. Whether or not an individual is a member of a crew of a vessel on the navigable waters of the United States presents primarily a question of fact which turns generally on whether the individual serves the ship in her navigation. (South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251, 259.) In consequence the determination of the Appeal Board, if sustained by substantial evidence, is conclusive upon the courts. (Labor Law, art. 18, §534; *Matter of Morton*, 284 N. Y. 167.) Upon this record there is substantial evidence to sustain the findings of fact in this regard of the Appeal Board. As to the four claimants who were found to be members of the crews of vessels, Sheredos was a cook on a self-propelled vessel carrying petroleum between points in New York and New Jersey; Schein was an

attendant on a speed boat which transported passengers from a New York city pier to the World's Fair; Knowlson was second engineer on a tugboat; Smith was a fireman on a lighter. All were plainly members of crews of vessels. On the other hand, Cassaretakis was assistant cook on board a dredge which was employed in a land filling operation in connection with the construction of a public highway. Bergen was a grain-trimmer on a floating grain elevator, his work being in connection with transfer of grain from one barge to another for purposes of further transportation. The employment of these two latter claimants, therefore, may be deemed incidental to construction and stevedoring operations, respectively, rather than to navigation. In consequence, Cassaretakis and Bergen, although concededly engaged in general maritime employment, were not members of crews of vessels on the navigable waters of the United States. These two claimants have, moreover, been found to be engaged in employment the whole or greater part of which was transacted within this State.

Two questions of law are raised, (1) whether there is constitutional objection to the application of the statute in question to maritime employments generally, and (2) if there is no such constitutional objection, whether the Congress preempted that part of the field relating to navigation by enacting a statutory prohibition against coverage by the State law, of officers and members of the crew of a vessel on the navigable waters of the United States.

In order to induce the several States to enact unemployment insurance statutes, the Federal government, by the Federal Unemployment Tax Act (Internal Revenue Code, U. S. Code, tit. 26, §§1600, 1601) levied a pay-roll tax upon employers, with certain exceptions, but allowed a credit up to ninety per cent of the Federal pay-roll tax to employers on account of contributions paid for State unemployment insurance. On its part the State of New York has levied a pay-roll tax upon employers measured by a percentage of the pay-roll and assessed upon all employers generally without regard to the nature of employment, with certain exceptions not here material (Labor Law, art. 18, §§ 515, 516). Neither the National nor the State govern-

ment contributes anything to the fund. The moneys collected by means of this tax are used for the relief of the unemployed, concededly an object within the powers of the State. (*Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495.)

This tax is an excise based upon the exercise of the privilege of employing individuals. (*Steward Machine Co. v. Davis*, 301 U. S. 548, 578-583; *Carmichael v. Southern Coal & Coke Co., supra; Patton v. Brady*, 184 U. S. 608.) The obligations of the employer under this law are not to his employees but to the State. Likewise, claimants of benefits assert their rights against the State and not against the employer. The employer's duty to pay contributions and the employee's right to receive benefits are independent of each other. The employer must continue to pay the tax although none of his employees ever becomes entitled to benefits through lack of employment; the employee has a right to receive benefits upon becoming unemployed although his employer has failed to contribute.

A mere statement of this State law demonstrates that it does not modify or attempt to modify, alter or supplement the rights and liabilities of the parties to any maritime contract, nor does it, touch remedies enforceable in admiralty. This tax exists independently of the employment out of which it arises. The measure of the tax by the amount of wages paid does not make the tax less independent of the occupation. Conceding that these claimants performed services under a maritime contract of employment, nothing in the challenged statute in any way changes, modifies or affects the reciprocal rights and duties of the employer and employee arising out of the maritime contracts or the remedies enforceable in admiralty. There is a fundamental distinction between statutes which interfere with the rights and obligations of the parties to a maritime contract, as between themselves, and a statute which effects no such interference.

The power to levy such an excise tax and to use the funds thus raised for local purposes is a sovereign power reserved to the States, of which they were not deprived by the Constitution of the United States. In *Carmichael v.*

Southern Coal & Coke Co., Mr. Justice Stone (now chief justice) said: "Taxes * * * may likewise be laid on the exercise of personal rights and privileges. As has been pointed out by the opinion in the *Chas. C. Steward Machine Co.*, case, such levies, including taxes on the exercise of the right to employ or to be employed, were known in England and the Colonies before the adoption of the Constitution, and must be taken to be embraced within the wide range of choice of subjects of taxation, which was an attribute of the sovereign power of the States at the time of the adoption of the Constitution, and which was reserved to them by that instrument." (P. 508.)

It is contended, however, that the State may not thus exercise its reserved powers of taxation because it involves a conflict with paramount powers vested in the Federal government in two respects; first, the State law is alleged to interfere with and burden maritime commerce in its national and international aspects as to which Congress alone has power to legislate; second, the State law is also alleged to contravene the essential purposes of and to work prejudice to characteristic features of the maritime law, and to interfere with its proper harmony and uniformity in its interstate and international relations.

The paramount power of Congress to legislate in the field of maritime law is implied from the grant to the Federal courts in section 2 of article III of the Federal Constitution, of judicial power in all cases involving admiralty and maritime jurisdiction. It is, however, well settled that in the maritime field, just as in the field of interstate commerce generally, the state has power to act in matters of merely local concern, which do not require uniform national legislation. (Cooley *v.* Board of Wardens, 12 How. [U. S.] 299.) One engaged in an interstate business may be lawfully subjected to a state tax upon the instruments employed in that business (Western Union Telegraph Co. *v.* Attorney-General, 125 U. S. 530), and this is so even though such commerce is maritime in nature (Old Dominion S. S. Co. *v.* Virginia, 198 U. S. 299, 305.)

In addition, by section 1606, subd. (a) of the Federal Tax Act, the Congress has declared that state unemployment insurance laws may be applied to interstate commerce.

And in Perkins *v.* Pennsylvania, 314 U. S. 586; affg., 342 Penn. St. 529, the Supreme Court has held that there is no constitutional obstacle under the commerce clause to the application of the Pennsylvania unemployment insurance law to those employed in interstate commerce. This would seem to be a conclusive determination that unemployment among those engaged in interstate commerce in general is a matter of local concern as to which no uniform national legislation is needed and in which field, therefore, the states may constitutionally legislate.

As to the second objection noted above and based upon the limitations upon state legislation stated in Southern Pacific Co. *v.* Jensen (244 U. S. 205) it would seem to be a sufficient answer to repeat that the enactment in question is a taxing statute designed to raise funds for a state purpose. It does not, therefore, attempt to alter the contract of employment between master and servant or to change the rights and remedies enforceable in admiralty as incidental to that relationship. It does not create any new rights or liabilities between the parties. Nothing contained therein would cause a court of admiralty to alter in any respect the body of law which it applies to the cases pending before it.

That a state may, within prescribed limits, enter into the field of maritime law and add to or modify remedies enforceable in admiralty was conceded by Mr. Justice McReynolds in the Jensen case. In Just v. Chambers (312 U. S. 383) a statute of the State of Florida, providing that a cause of action for personal injuries shall survive the death of the tort feasor, was held to be applicable in a court of admiralty to an action against the owner of a vessel on account of injuries occurring on navigable waters within the State boundaries. The State law, it was said, did not offend the criteria of essential purpose and uniformity laid down in the Jensen case. If, therefore, the states may, within the prescribed limits, actually add to the remedies under maritime law, a fortiori, the legislation in the case at bar may not be held to have overridden the limitations set forth in the Jensen case.

Respondents point to a line of authorities (Southern Pacific v. Jense, supra; Knickerbocker Ice Co. v. Stewart, 253

U. S. 149; Western Fuel Co. v. Garcia, 257 U. S. 233; Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469) holding workmen's compensation statutes invalid as interfering with the characteristic features and essential uniformity of admiralty law. These cases all rest upon the principle that the workmen's compensation laws set aside the common law rules respecting the rights and liabilities of employer and employee and substituted new rules for determining such rights and liabilities. These statutes become a part of the contract and thereby directly affect the rights and duties between the parties. As was said by this court in Matter of Doey v. Howland Co. (224 N. Y. 30, 36): "An award under the Workmen's Compensation Law is not made on the theory that a tort has been committed; on the contrary, it is upon the theory that the statute giving the commission power to make an award is read into and becomes a part of the contract. (Matter of Post v. Burger & Gohlke, 216 N. Y. 544.) The contract of employment, by virtue of the statute contains an implied provision that the employer, if the employee be injured, will pay to him a certain sum to compensate for injuries sustained, or if death results, a certain sum to dependents."

A clear distinction between these cases and that of the unemployment insurance law is that the latter does not in any way operate upon the contract of employment or interfere with maritime and admiralty jurisdiction. The payment of an excise tax upon the privilege of employing others can no more be considered an unwarranted intrusion by the states into admiralty jurisdiction than can numerous other state taxes previously upheld; for instance, franchise taxes upon towing companies (People ex rel. Cornell Steamboat Co. v. Sohmer, 235 U. S. 549); taxation of insurance companies upon the writing of marine insurance policies (Ætna Ins. Co. v. Houston Oil & Transport Co., 49 Fed. Rep. [2d] 121); taxes upon shipping (Transportation Co. v. Wheeling, 99 U. S. 273); and tolls levied upon interstate and foreign shipping using state-improved waterways. (Sands v. Manistre River Improvement Co., 123 U. S. 288.)

It follows that there is no constitutional objection to coverage of maritime employments by the Unemployment Insurance Act of New York State.

We are thus brought to the second question, namely, whether by virtue of the provisions of section 1607 (subd. c) (par. 4) of the Internal Revenue Code (U. S. Code, tit. 26) the officers and members of the crew of a vessel on the navigable waters of the United States have been specifically excluded by Congress from coverage by state laws. We may assume that Congress has the constitutional right under the admiralty clause of the Federal Constitution, to exclude maritime employments from coverage by state unemployment insurance.

In other words does the fact that the Federal Act in the case at bar exempts from its operation the officers and crews of vessels on navigable waters prevent the states from covering maritime employment in the unemployment insurance laws which they have enacted?

From the nature of the independent power reserved to the states of taxing for their own support and to promote the general welfare of their inhabitants, there has been developed the principle that it will not be presumed that Congress intended to exclude the reserved powers of the state by virtue of paramount powers vested in Congress by the Federal Constitution unless an actual conflict exists between Federal and State legislation. In Savage v. Jones (225 U. S. 501) the court lays down this principle (at p. 533): "But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State."

A comparison of the Federal tax act and our State unemployment insurance act shows that there is no actual conflict between them even when the State act is construed to cover employments expressly exempted under the Federal taxing statute.

The Federal statute, of course, is not an unemployment insurance law. It is a mere taxing statute but contains a provision allowing ninety per cent of contributions exacted thereunder to be credited by employers against contributions enacted thereunder to be credited by employers against

contributions paid under certified state systems. This credit arrangement was designed to give the states an incentive to enact their own unemployment insurance laws and to protect those states which enacted such laws against being put at a competitive disadvantage as against other states which might fail to take such action. Congress evidently believed that these objects could be accomplished by taking only certain kinds of employment while exempting other kinds. The states in creating their unemployment systems, on the other hand, had different objectives in view in canvassing the kinds of employment to be covered or excluded under their statutes. Their problem was to decide what types of employment seriously required the protection of an unemployment compensation law and what types could practically be included within such a system. Whatever types of employment the Congress might exclude, the states might exempt wholly different types upon the ground that employees in these categories did not require such protection or else that it would be impracticable or impolitic to furnish them with such protection. There is, therefore, no necessary similarity as to the types of employment either covered or exempted by the Federal and state statutes respectively.

The legislative history and the judicial interpretation of the Federal statute amply demonstrate that it was not intended thereby to strait-jacket the states in the enactment of their own unemployment insurance laws. (See Senate Report, No. 628, Cal. No. 661, 74th Congress, p. 14; Steward Machine Co. v. Davis, supra, at pp. 593, 594.) The conclusion is inescapable that Congress intended to leave to the states the widest possible latitude in setting up their unemployment compensation systems both as to the kind and extent of coverage provided. This broad policy may not be overriden by the exemptions contained in section 1607 (subd. c) (par. 4).

One word should be said in conclusion as to the argument advanced that great practical difficulties lie in the way of the states providing benefits for seamen, the nature of whose work may take them into many other states and even into foreign parts. A picture is drawn of the hopeless confusion into which maritime employment may be plunged if

a number of states attempted to apply conflicting state statutes to the same employer-employee relationship. The difficulty conjured up would appear to be more imaginary than real and in no event could affect the result arrived at herein. It may be that Congress will in future decide to appropriate the entire marine field to a uniform unemployment insurance system. Such congressional action might effectively oust the states from the field because of the paramount power vested in Congress by section 2 of article III of the Federal Constitution. It is sufficient for the purpose of these appeals, however, to say that no such obstacle stands in the way of state legislation at the present time.

It follows that in the cases of the claimants, Cassaretakis and Bergen, the orders of the Appellate Division should be reversed and the determination of the Unemployment Insurance Appeal Board affirmed; in the cases involving Sheredos, Knowlson, Schein and Smith, the orders of the Appellate Division and the determination of the Unemployment Insurance Appeal Board should be reversed and the cases remitted to such Appeal Board for proceedings in accordance with this opinion, all with costs in this court and in the Appellate Division.

Lehman, Ch. J., Loughran, Rippey, Lewis, Conway and Desmond, JJ., concur.

Ordered accordingly.

APPENDIX "B".

SUPREME COURT, APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

Decision handed down Nov. 19, 1941.

395-5

In the Matter of The Claim for Benefits under Article 18 of the Labor Law made by MIKE CASSARETAKIS, *Claimant*,

STANDARD DREDGING CORPORATION, *Appellant*,

FRIEDA S. MILLER, as Industrial Commissioner, *Respondent*.

Appeal by employer-appellant from a decision of the Unemployment Insurance Appeal Board, which held that the New York Unemployment Insurance Law covered the services of the claimant as a cook and cook's helper aboard employer-appellant's dredge.

Claimant was employed by appellant first as a cook's helper and later as a cook aboard a hydraulic suction dredge documented as a vessel of the United States. His duties consisted of preparing meals, waiting on tables and cleaning up the kitchen and dining room. He ate his meals on board the dredge and customarily slept there. The dredge on which he was employed was operating on navigable waters of the state.

Clearly, claimant, a cook, was a member of the crew of a documented vessel operating on navigable waters. The dredge was licensed and enrolled as a vessel of the United States. Accordingly, claimant is not subject to the jurisdiction of the Unemployment Insurance Law but is subject solely in respect of the matter in controversy here to the admiralty and maritime jurisdiction of the United States. (Article III, Section 2, Constitution of the United State...)

The grant of admiralty jurisdiction to the federal government was intended to commit direct control and to relieve maritime commerce of unnecessary burdens by reason

of discordant legislation of the several states. (Knickerbocker Ice Co. *v.* Stewart, 253 U. S. 149.)

The Social Security Act specifically excepts from the term employment "services performed as an officer or member of the crew of a vessel on the navigable waters of the United States." (Section 1607 (c) (4) Internal Revenue Code. See also Matter of Bergen *v.* Miller, Industrial Commissioner, decided by this court November, 1941.)

Decision of the Unemployment Insurance Appeal Board should be reversed.

Decision of the Unemployment Insurance Appeal Board reversed, with costs to appellant.

Hill, P. J., Crapser, Bliss, Hefferman and Schenck, JJ., concur.

APPENDIX "C".

(Matter of Claim of Mike Cassaretakis)

DECISION OF APPEAL BOARD IN CASE NO. 4014-40.

STATE OF NEW YORK,
Department of Labor,
Unemployment Insurance Appeal Board:

Re: Name 511-314-40R.

S. S. No.—— Employer No. ——

The employer appeals from the decision of the referee dated October 9, 1940 holding that the claimant worked in covered employment and is entitled to be credited with his earnings with said appellant.

Hearings were held before the referee at which all parties appeared and were accorded full opportunity to be heard. Briefs submitted on behalf of the Industrial Commissioner and the employer have been considered by the Board.

After a careful review of the record, testimony and evidence adduced before the referee, and due deliberation having been had thereon, and having found that the referee's findings of fact and conclusions of law are fully supported

by the evidence in this case, and that no errors of fact or law appear to have been made, the Board adopts the findings of fact and the conclusions of law made by the referee as the findings of fact and conclusions of law of this Board.

Opinion:

The Board is of the opinion that the referee made proper findings of fact and correctly determined the issues involved in this case. This Board's recent opinion in Appeal Board No. 3604-40 is so applicable to the instant facts that we incorporate it herein by reference. Appeal Board No. 2552-40, relied on by the appellant, is not in point. The latter case involved a "vessel propelled by steam commissioned to carry petroleum products." In the instant case, the vessel involved is a non-self propelled dredge carrying neither cargo nor passengers.

Decision:

Claimant worked in covered employment within the meaning of the New York State Unemployment Insurance Law and is entitled to be credited with his earnings with the appellant as fixed by the reference.

The decision of the referee is affirmed.

Dated: March 3, 1941.

(S.) JOHN E. MCGARRY,
Member.

DECISION OF UNEMPLOYMENT INSURANCE APPEAL BOARD IN CASE NO. 3604-40 INCORPORATED BY REFERENCE IN APPEAL BOARD'S DECISION IN INSTANT CASE.

STATE OF NEW YORK,
Department of Labor,
Unemployment Insurance Appeal Board:

Re: Name ——. S. S. ——.

Decision Case No. 3604-40, 532-559-40R, 32-20-40R, 532-595-40R, 531-279-40R, 44-14-40R, 535-603-40R, 32-21-40R, 510-228-40R, 510-352-40R, 536-481-40R, 32-18-40R.

The employer appeals from the decision of the referee dated July 12, 1940, holding that eleven claimants and all

others similarly employed, worked in covered employment with the appellant and are entitled to be credited with their earnings in such employment.

Hearings were held before the referee at which representatives of the employer and some of the claimants appeared and testified. A further hearing was held before this Board at which representatives of the employer, the Industrial Commissioner and some of the claimants appeared and had full opportunity to be heard.

Based on the record and testimony in this case, the Board makes the following

Findings of Fact:

The employer is a Delaware corporation, licensed to do business in the State of New York, with its home office in Brooklyn, New York. It pays the New York State Franchise Tax and makes contributions under the Unemployment Insurance Law on those employees whose employment it concedes to be subject to the law.

During 1939, the employer was engaged in the performance of two contracts, one with the State of New York, the other one with the City of New York. Under its contract with the State of New York the employer was engaged in deepening the Barge Canal. For that purpose it employed a dredge known as the "Empire State". This dredge was built in 1912, is 138′ 5″ long, 40′ wide, 8′ 6″ deep and has a gross tonnage of 369 tons. During 1939, the dredge was operated entirely within the State of New York. It is equipped with a triple expansion steam engine for the operation of its pump, but this engine is not used to navigate the dredge. The dredge is not self-propelled and is not equipped with a rudder. It has lights and a steam whistle for signalling purposes. During 1939, the dredge was not documented.

The dredge operated on the so-called suction principle. The material on the bottom of the canal was sucked up by a pump and carried to the shore through pipe lines supported by floating pontoons. During operations the dredge was moved by means of swinging wires and spuds.

The crew of this dredge consisted of a "captain", operators, mates, deck hands, engineers, oilers, firemen and engine room helpers. There was also a carpenter, welder and welder's assistant. No licenses of any kind were required for these men.

In addition to the men who worked on board the dredge or on the pipe lines and floating pontoons, there was a shore crew working under the supervision of a foreman. The appellant's superintendent was in charge of both crews and was the superior of the "captain" and of the foreman. During the progress of this work, the men neither ate nor slept aboard, but went to and from the dredge by boats provided by the employer.

When the dredge was transported from Arverne, New York to its base of operations at the Canal, the employer provided food and sleeping quarters for its personnel on board.

Contributions were originally paid under the New York State Unemployment Insurance Law, but subsequently the employer claimed a credit for these payments, contending that the employment of the persons aboard the dredge was exempt from the provisions of the New York State Unemployment Insurance Law.

The contract with the City of New York provided for the creation of a fill for the Shore Parkway then under construction. As an incident to the creation of a fill, the contract with the City provided for the dredging of a channel in Jamaica Bay. The appellant used two dredges in the raising of the fill for the Shore Parkway, known as dredge No. 5 and dredge No. 2.

Dredge No. 5 was built in 1921 and is 155′ long, 43′ wide and 10′ 3″ deep. The main dredge pump is operated by a 3600 horse power steam turbine. In addition to the suction pump, this dredge has a cutter which loosens the material to be sucked up from the bottom of the Bay.

This dredge was towed along the sea coast at various times from job to job. During these trips it carried an anchor, life-boat, life-preservers, food supplies and had sleeping accommodations for its personnel on board. While the dredge was operating in Jamaica Bay, neither food nor

sleeping quarters were available to the men employed on the dredge. During these operations 42 men were employed on it. They consisted of a "captain", operators, mates, deck hands, a welder, engineers, oilers and firemen. During operations the dredge was able to move about eight feet at a time by means of spuds; otherwise it was not self-propelled. It was not documented during 1939. It was equipped with lights, fog bell and steam whistle for signalling. A "captain" was in charge of the dredge crew, a general foreman was in charge of a shore crew and a superintendent of the employer supervised both. The deck hands worked on the dredge, floating pontoons and sometimes on shore, spending about half of their time on the dredge. No licenses were required for any of the men aboard the dredge.

Dredge No. 2 was built in 1908. Its main pump was operated by a 500 horse power motor. It was not self-propelled, but could move slightly by means of a swinging wire. It had a suction pump only and was not equipped with a cutter. It had lights and a steam whistle for signalling purposes. This dredge was not documented during 1939. Dredge No. 2 complemented the operations of dredge No. 5 in Jamaica Bay. None of the members of the crew of dredge No. 2 were required to be licensed.

Four of the claimants herein were employed as deck hands, one as assistant engineer, three as oilers and three as firemen. Their services were rendered either on the dredges, pontoons or on the pipe lines resting on the pontoons. One of the firemen worked part of the time with the shore gang. There is no dispute as to the earnings of any of the claimants herein. The employer paid contributions under the Unemployment Insurance Law on the earnings of the persons employed in the shore gangs.

Opinion:

The sole issue on this appeal is whether or not the employment of the claimants herein in the dredging of the Barge Canal and Jamaica Bay was exempt under the provisions of the Unemployment Insurance Law.

Subject to the paramount right of the United States Government to regulate navigation, New York State retained its territorial jurisdiction over the two places where the employment of the claimants occurred (*The Lewis Blue Point Oyster Cultivation Co.* v. *Briggs*, 198 N. Y. 287, 291). Most of the contentions of the appellant herein have been raised and answered in our decision in Appeal Board No. 1180-39. We there said:

"The employer concedes that it is subject to the Unemployment Insurance Law with reference to those employees who are employed by it on land. It contends, however, that the Act can not apply to the claimant because claimant is engaged in a maritime pursuit which is subject to the exclusive jurisdiction of the United States Government.

"The state law in terms applies to all employees subject to a few enumerated exceptions. The employment of the claimant does not come within the exemptions therein stated. The Act, therefore, applies to the claimant, unless it is in conflict, insofar as the claimant is concerned, with some provisions of the State or Federal Constitution. The employer contends that so far as the claimant is concerned, the application of the Act to him would bring it in conflict with Article 3, Section 2 of the Federal Constitution which grants to the United States Government exclusive jurisdiction over admiralty and maritime matters. The appellant argues that the dredging and widening of the barge canal was a maritime undertaking subject to the exclusive jurisdiction of the Federal Government and may not be regulated or taxed by the State of New York.

"We may assume for the purposes of this decision that the claimant was engaged in work of a maritime nature. The question before us whether the imposition of the tax required by the Unemployment Insurance Law with reference to the claimant is an interference with the exclusive maritime jurisdiction of the United States. The appellant says it does and relies primarily on the following cases: Knickerbocker Ice Company vs. Steward, 253 U. S. 149; The Industrial Accident Commission of California vs. Rolf Company, 264 U. S. 219. Both of these cases deal with workmen's compensation acts. An examination of the

decision will reveal that the Court held that the workmen's compensation laws of the states involved alter the contract rights existing between the employer and employee and deprive the parties thereto of the right to litigate claims arising therefrom in the federal courts. It is because the action in effect deprives the parties to a maritime contract of their right to litigate claims arising from maritime employment in the United States Courts that these statutes were held to offend against the Constitution of the United States.

"It thus becomes necessary to examine into the provisions of the New York Act to discover whether its provisions alter either presently existing common law rights or create new ones with reference to maritime contracts. The cardinal provisions of the New York Unemployment Insurance Act is the imposition of a tax on employment. The nature of the tax imposed by the New York law is no different than that imposed by the provisions of Section 901 of the Social Security Act. It is also of the same kind as that imposed by the State of Alabama under its Unemployment Compensation Act.

"The Social Security Act of the United States has been passed upon by the United States Supreme Court in the case of Steward Machine Company vs. Davis, 301 U. S. 548. The provisions of the Alabama Unemployment Compensation Act were passed upon by the highest court of the State of Alabama in the case of Beeland Wholesale Company vs. Kaufman, 174 So. 516 and also by the United States Supreme Court in the case of Carmichael vs. Southern Coal & Coke Company, 301 U. S. 495.

"In the two cases above mentioned, the Steward Machine Company case and the Carmichael case, the United States Supreme Court held that the payroll tax imposed by Section 901 of the Social Security Act and the one imposed by the Alabama Unemployment Compensation Act were in the nature of an excise tax and constituted a valid exercise of the taxing powers of the United States and of the State of Alabama; that those acts do not offend against any provisions of the United States Constitution.

"Judge Cardozo in the Steward Machine Company case pointed out that the excise tax was known in the law both in this country and in England long before the adoption of the Federal Constitution and antedated it. The tax, while depending upon a status of employer-employee relationship and measured by the amount of the payroll, does not interfere with the basic relationship that exists between the parties. It creates no new rights and imposes no new liabilities. It does not give any right to the claimant as against the employer. The right to compensation created by the act is given against the State and not against the employer.

"The claim for unemployment insurance benefits is paid out of the State Fund and depends on many other factors besides work in covered employment. The appellant is not required to pay contributions in an amount sufficient to pay the claims of any of his employees. The extent of the employer's liability is merely the payment of a tax. As a matter of fact, claimant would receive his benefits even if the employer failed to pay the tax.

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"It is thus obvious that the imposition of the tax on the employer, although based upon the status of employer-employee relationship does not interfere with any contract rights the employer might have, while engaged in its maritime pursuit. It does not impose any unreasonable burdens on the employer and does not constitute an interference with the maritime jurisdiction of the United States. The grant of benefit rights to the claimant does not militate against the validity of the taxing act. As has been said by Judge Stone in the Carmichael case:

" ' "But if the tax, *qua* tax, be good, as we hold it is, and the purpose specified be one which would sustain a subsequent and separate appropriation made out of the general funds of the Treasury, neither is made invalid by being bound to the other in the same act of legislation." Cincinnati Soap Co. v. U. S., supra' (page 521)

"The mere fact that a certain matter be within the apparent jurisdiction of the United States does not *ipso*

facto divest the state of all legislative functions with reference to the matter. The state may legislate with reference to such matters within certain limitations.

"'It is not questioned, that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction, is in the government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of sovereignty not yet given away.' U. S. v. Bevans, 3 Wheat. 356, 388.

"Within this exclusive maritime field there is also an area of proper state action. There are numerous cases where the exercise by the state of jurisdiction over maritime matters and interstate commerce have been sustained by the courts. This is particularly true with reference to subjects as to which Congress has failed to legislate. See Minnesota Rate Cases, 230 U. S. 352. Typical examples of state legislation with reference to maritime and interstate commerce matters are the following cases: Cooley vs. Board of Wardens, 12 How. 299, where a state law, which compels vessels to take a pilot and imposes a fee, has been sustained; Smith vs. Alabama, 124 U. S. 465, compelling locomotive engineers engaged in interstate commerce to be examined and licensed by state authorities; Nashville Chattanooga & St. Louis Railway v. Alabama, 128 U. S. 96, where locomotive engineers were required to be examined for defective eyesight; N. Y., N. H. & H. R. R. Co. v. N. Y., 165 U. S. 628, regulating the heating of passenger cars; Chicago, Milwaukee & St. Paul R. R. Co. v. Solan, 169 U. S. 133, prohibiting railroad companies from contracting away liability for torts. It is needless to multiply these examples. It is sufficient to say there is always a borderline area of subject matter over which both the United States Government and the state governments may properly exercise concurrent jurisdiction.

"Thus, conceding the maritime jurisdiction of the United States Government over the functions performed by claimant as a maritime matter, the State of New York has not

been deprived of all jurisdiction over the same subject matter. It is still exercising sovereign powers over the territory wherein the claimant was employed.

" 'The case in this relation falls within the principle of our decision in James vs. Dravo Contracting Company, supra. The question, we there said, was not one of the paramount authority of the Federal Government to have the work performed for the purposes within the federal province. The title to the bed of the river was in the State. And, although subject to the dominant right of the Federal Government, the servient title continued in the State which thus retained its territorial jurisdiction for purposes not inconsistent with the exercise by the Federal Government of its constitutional functions.' Atkinson v. Tax Commission, 303 U. S. 20, 22. See to the same effect the cases of Silas Mason Co. vs. Tax Commission, 302 U. S. 186; James vs. Dravo Contracting Company, 302 U. S. 134.

"At any rate the right of the state to impose an excise tax on activities which are within the scope of the Federal jurisdiction is not an open question any more. It has been passed upon by the United States Supreme Court in a number of cases. Its extent has been laid down by that Court in the case of Hump Hairpin Manufacturing Company vs. Emerson, 258 U. S. 290, 294:

" 'While a State may not use its taxing power to regulate or burden interstate commerce (citing cases), on the other hand, it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights.'

"The validity of a state tax on an instrument of maritime commerce has been sustained in the case of Old Dominion S.S. Company vs. Virginia, 198 U. S. 299, 305.

"Assuming the general validity of the State Unemployment Insurance Law as we must (see Chamberlain vs. Andrews, 271 N. U. 1), its application to the employment of the claimant does not offend against the Federal Constitution. It does not constitute an interference with the maritime jurisdiction of the United States.

"However, we do not intend to say that the imposition of the tax will be valid under all circumstances. We realize that its application to the claimant brings it into the sphere of normal Federal jurisdiction. The extent of that jurisdiction is not always defined. It is susceptible of extension both by judicial decisions of the Federal Courts and by action of Congress.

" 'The precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history.' The Blackheath, 195 U. S. 361, 365.

"Should Congress act with reference to the subject matter of the legislation herein involved, we may concede that the state would be ousted of jurisdiction.

" 'But the authority of state laws or their administration may not interfere with the carrying out of a national purpose. Where enforcement of the state law would handicap efforts to carry out the plans of the United States, the state enactment must, of course, give way.' Stewart & Co., Inc. vs. S. Dracula, decided by the U. S. Supreme Court on January 29, 1940.

"A good illustration of this principle is found in the Railroad Unemployment Insurance Act (Approved June 25, 1938). Until the passage of that act the New York State Unemployment Insurance Act applied. The moment the United States Congress had passed the Railroad Unemployment Insurance Act, New York State was ousted from jurisdiction. Its application to railroad workers then became a nullity because it interfered with the federal objective. It required no state legislation to repeal the act in order to accomplish that purpose.

"Relying on this principle, the appellant argues that assuming the general validity of the New York Unemployment Insurance Act and its possible application to employment normally under federal jurisdiction, its application to maritime matters is a nullity because maritime activities have been expressly excepted by Federal legislation. The appellant relies on the provisions of Section 903 of the Social Security Act which grants exemption from taxation on the employment of officers and members of a crew of vessel. Differently stated, the appellant contends that the provision

just referred to constitutes legislation by the United States Congress with reference to unemployment insurance covering employment of a maritime nature; that this action has ousted all states of any jurisdiction over such employment.

"In determining the intent of the United States Congress in enacting Section 903 of the Social Security Act, other pertinent provisions must be taken into consideration. Congress did not create a Federal scheme of unemployment insurance benefits. The object of the national legislation was to encourage and invite the states to enact laws of their own which would complement federal legislation. In inviting the states to enact unemployment insurance acts, Congress has expressly provided that employment in interstate commerce shall not be a defense to the payment of any state tax. Thus it is apparent that Congress desired the states to cover fields which normally come within the United States jurisdiction. Employment in interstate commerce, as far as the United States is concerned, is not any different than employment of a maritime nature.

"It is therefore obvious that the only group that Congress excluded was one coming within the narrow definition of the phrase 'officers and members of a crew of a vessel.' This is a phrase of exclusion and should not be given a narrow construction. We are not altogether without guidance in the construction of the language used. Similar language has been used by the United States Congress in enacting a Workmen's Compensation Act covering harbor workers. In construing this language the United States Circuit Court of Appeals in the case of Diomede v. Lowe, 87 Fed. (2d) 296, at page 298, said:

" 'The crew is usually referred to and is naturally and primarily thought of as those who are on board and aiding in the navigation without reference to the nature of the arrangement under which they are on board.

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" 'The rule In re O'Donnel, 26 F. (2d) 334 (C. C. A. 2), that the tug and barges together constitute one vessel under the Harbor Act (46 U. S. C. A. § 190-195), and all must therefore be seaworthy, has little bearing upon the question before us. Assuming that the flotilla were to be regarded

as a "vessel" within the meaning of the excepting clause, nevertheless the question whether the decedent was the member of a crew must be determined solely from the nature of the decedent's employment with relation to the scow upon which he worked.'

"Applying the test of this case to the claimant, it is apparent he does not come within the category of an officer or a member of a crew of a vessel as described in Section 903 of the Social Security Act. The dredge upon which claimant was employed was not engaged in navigation; it was not engaged in the transportation of passengers or freight. It had no officers in the accepted sense of the word, nor a crew within the same meaning. The operations of the dredge involved construction rather than navigation. It was intimately connected with and was part of land operations. The claimant worked under the supervision of a foreman and superintendent rather than an officer of a vessel.

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"In deciding the question of conflict of jurisdiction between the United States and a state government it must be borne in mind that we are not dealing here with a conflict between alien powers; that cooperation between Federal and state authorities has been frequent and received the approval of the court. This is a case of such cooperative effort.

"As has been said by Judge Stone in the Carmichael case at page 526:

" 'The United States and the State of Alabama are not alien governments. They co-exist within the same territory. Unemployment within it is their common concern. Together the two statutes now before us embody a cooperative legislative effort by state and national governments for carrying out a public purpose common to both, which neither could fully achieve without the cooperation of the other. The Constitution does not prohibit such co-operation.'

"We conclude that claimant worked in covered employment within the meaning of the Unemployment Insurance Law of the State of New York."

The foregoing opinion disposes of all the issues raised by the appellant, with a single exception. The exception relates to the argument of the appellant that in enacting the Social Security laws, Congress had no visible object in excepting seamen only and that the phrase "officers or members of a crew of a vessel" covers the entire maritime field which is within the exclusive Federal jurisdiction. It appears to us that there are many reasons which readily present themselves for the exclusion of seamen alone as distinguished from maritime workers generally from coverage under state laws. Seamen are hired and their employment is terminated not only throughout the many ports in the United States, but also in ports throughout the world. It may well have been contemplated that no state could set up administrative machinery to ascertain the period of unemployment of seamen laid off in foreign ports; nor would a state have facilities to offer such seamen reemployment as required by the provisions of the several State Unemployment Insurance Laws. These administrative difficulties are confined to seamen only whose duties take them all over the world.

Harbor workers, on the other hand, have a definite *locus* of operation and are usually confined within the territorial jurisdiction of the state involved. Dredge workers are within the same category as longshoremen, drydock workers and other harbor workers. In enacting the Social Security Law, Congress selected language used in the Longshoremen and Harbor Workers Act, which was intended to restrict its application to seamen only. The phrase "officers or members of a crew of a vessel," having such restricted meaning, was inserted into the Social Security Act and must be construed to exclude only the members of a narrow group whose employment it was not deemed feasible to cover under State Acts.

"The word 'crew' does not have an absolutely unvarying legal significance. • • • When the 'crew' of a vessel is referred to, those persons are naturally and primarily meant who are on board her aiding in her navigation, without reference to the nature of the arrangement under which they

are on board. South Chicago Coal & Dry Dock Co. et al. v. Bassett, 309 U. S. 251, 258 and 259."

An analysis of legislation by Congress on the subject of Social Security leads to the conclusion that the exception contained therein is intended to be limited to seamen only and not to all persons engaged in rendering services of a maritime nature. Section 811 (b) 5, Title VIII of the Social Security Act, formerly excepted from coverage under the old age provisions the following: "Service performed as an officer or member of the crew of a vessel documented under the laws of the United States or of any foreign country."

The taxing provisions of the old age portion of the Social Security Act are now contained in sub-chapter A of chapter 9 of the Internal Revenue Code. Section 1425 (b) now defines employment under the Act to include "(B) on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if the employee is employed on and in connection with such vessel when outside the United States, * * *."

It is thus obvious from the above quoted provision, that seamen employed on American vessels are now covered under the old age provisions of the Social Security Act. If we were to adopt the contention of the appellant that the phrase "services performed as an officer or member of a crew of a vessel" excludes all maritime workers from coverage under Title VIII of the Social Security Act, we would have the anomaly that seamen in American vessels would be covered under Section 1426 (b) of the Internal Revenue Code for old age pensions, while dredge workers, drydock workers, longshoremen and all other harbor workers would be excluded under the same act. It is obvious that such contention is untenable.

We therefore conclude that persons employed on a dredge while engaged in dredging operations, are not officers or members of a crew of a vessel within the meaning of the Social Security Act and are not excluded from coverage under the New York State Unemployment Insurance Law.

Decision:

The claimants herein and all other persons similarly employed worked in covered employment and are entitled to be credited with their earnings in the amounts fixed by the referee.

The decision of the referee is affirmed.

Dated: February 20, 1941.

(s) JOHN E. MCGARRY,
Member.

APPENDIX "D".

Decision of Referee.

STATE OF NEW YORK

Department of Labor

Unemployment Insurance Referees' Unit

Claimant: Mike Cassaretakis.
Referee: Louis J. Naftalison.

S. S. No. 124-10-5937

At New York City

Case No. 511-314-40R

On September 11, 1940

Date of Decision: October 9, 1940

Appearances:

Mike Cassaretakis, Claimant.

Standard Dredging Corporation, by Walfred L. Paulson, Vice-President and Secretary; George F. Gee, Dredging Captain; Ray Pippitt, Clerk.

Kirlin, Campbell, Hickox, Keating & McGrann, by H. Maurice Fridlund, Esq.; Roy T. Parker, Esq. Earl Q. Kullman, Esq., of Counsel, attorneys for employer.

Division of Placement and Unemployment Insurance, Legal Bureau, by Harry I. Rosen, Esq.

Issue:

Whether claimant, while employed as a cook and cooks' helper aboard a dredge, worked in covered employment.

Findings of Fact:

Claimant worked aboard the dredge "Miami" from February 4, 1939, to March 15, 1939, while the dredge was located in the waters at Bayonne, New Jersey. During this period his employer was the Standard Dredging Corporation of New Jersey, the owner of the vessel.

From March 15 to August 15, 1939, claimant was employed aboard the same dredge, but during this period his employer has been established to be the Standard Dredging Corporation (a New York corporation). Both concerns are interrelated, and it has been established that the New York corporation operated the dredge from March 15 to August 15, 1939, at least under a charter arrangement with the New Jersey corporation.

Claimant's services for the New Jersey corporation having been performed wholly outside the State of New York, his employment and earnings have been disregarded for the purpose of this decision.

The Standard Dredging Corporation of New York is a covered employer. During the period with which we are concerned, it was engaged in operating the dredge "Miami" in Gravesend Bay, which is adjacent to the Borough of Brooklyn, City of New York. It had a contract with the City of New York Park Department to pump material from beneath the surface of Gravesend Bay on to the land in order to fill in the shore line and create an addition to a public highway under the jurisdiction of the Park Department. The dredge was non-self-propelled, but moved from spot to spot in the vicinity of its operations by means of cables or spuds. The material excavated from underneath the waters was conveyed to land by means of pipe lines attached to the dredge, and which rested upon pontoons spaced between the dredge and the shore.

A superintendent was in charge of the workers aboard the dredge, and although maritime titles were applied to these positions, the description of the work seems to indicate that their labors were principally with the operation of the dredging machinery and engines, as well as the incidental work connected therewith.

Claimant's work was that of assistant cook, dishwasher and waiter, taking care of the feeding requirements of the personnel of the dredge. He slept aboard the dredge. During the last few weeks of his employment, he served as a watchman while the dredge was out of operation and tied up.

The employer has fixed the value of claimant's maintenance at a dollar per day, and the claimant has accepted this figure as a reasonable one.

The employer has not paid contributions on the earnings of claimant and others similarly situated, because it contends that claimant is a member of a crew of a vessel and, therefore, is excluded from the coverage of the New York State Law. It further contends that the dredging operations were wholly maritime in character because they were performed following the issuance of a permit by the United States Engineer's office of the War Department. It appears that this governmental agency is charged with the duty of exercising control over the navigable waters, and that it is a condition precedent to working in such waters for a permit to be issued from this agency.

The work of the dredge in this particular instance was definitely in connection with the construction of a highway on land. It carried no cargo, nor passengers. It definitely was not engaged in the general work of navigation. The personnel aboard the dredge were not required to be licensed by any federal agency. The employer's attorneys argue that it is not the use to which the dredge was put that controls, but rather its nature, and that it was adapted to do wholly maritime work in the deepening of harbors and removing of obstructions from channels, et cetera.

At the conclusion of the case there was no dispute between the parties as to claimant's earnings.

They are as follows:

Standard Dredging Corporation,
(A New York corporation),
80 Broad Street,
New York, New York.

1939.

First Quarter	Second Quarter	Third Quarter
93.31	339.96	140.83

Decision:

The attorneys for the employer spent considerable time in arguing that the dredge "Miami" is a vessel documented under the laws of the United States. This conclusion, however, is not controlling on the unemployment insurance issue before me. They further argue that a cook, or cook's helper, is a member of a crew of a vessel. Again, that broad proposition is not applicable to the facts in the immediate case. They further contend that the work of the dredge "Miami" in this particular instance was distinctly maritime, because it was done pursuant to a War Department permit. However, the compliance with the War Department's regulations, as to the performance of operations on the navigable waters of the United States, does not take away from the State of New York the right to tax employment such as is here concerned.

The operations of the dredge "Miami" involved construction rather than navigation. It was intimately connected with, and was part of, a distinct land operation, namely, to fill in the shore line to create a roadway on land. The work was done under the supervision of a superintendent rather than the officer of a vessel.

This case is controlled by the decision of the Appeal Board in Case No. 1180-39, which held that even though the employment involved may be maritime, that in and of itself was not sufficient to deprive the State of New York of the

right to tax the payrolls concerned. The Appeal Board held that the claimant in that case, employed on a hydraulic dredge operating similar to the "Miami" in this case, worked in covered employment, and that unless Congress had reserved to itself exclusive jurisdiction in this maritime situation, the State of New York was free to legislate and tax. In this case New York has jurisdiction because all of the work here involved was performed within its territorial borders.

The only question which now remains is whether claimant comes within the definition of the phrase, "officers and members of a crew of a vessel," as prescribed in the Social Security Act. The Appeal Board has ruled that this is a phrase of exclusion and should be given a narrow construction. The Appeal Board has found that the term "crew" is referred to, and is naturally and primarily thought of, as including those who are on board and aiding in the navigation of a vessel. The nature of claimant's employment with relation to the dredge upon which he worked is determinative of the question whether he was to be considered a member of a crew within the purview of the Federal Act.

Claimant, working aboard a non-self-propelled dredge operating in New York harbor to aid in land work, is definitely not a member of a crew within the compass of the Federal intention. The dredge was not engaged in navigation, nor in the transportation of passengers or freight. It had no officers in the accepted sense of htat word, nor a crew, within the same meaning. Despite maritime titles, the work was in the construction field, under the direction of a superintendent, who was placed in authority above the so-called captain of the dredge.

On the basis of the Appeal Board decision, as herein discussed, I find that claimant worked in covered employment within the meaning of the Unemployment Insurance Law of the State of New York, and that he is entitled to be credited with the foregoing earnings, towards the payment of benefits due. I further hold that the employer is liable for contributions accordingly on the earnings of claimant and others similarly situated.

A copy of this decision is being sent to the Bureau of Tax and Wage Records for the collection of contributions due.

LOUIS J. NAFTALISON,
Referee.

9/5/40—A. Weinstein.
9/11/40—W. Newrock, Bk. No. 125.
10/7/40—D. Codner, Decision Only.

To: Mike Cassaretakis, 311 West 27th Street, New York, New York. Standard Dredging Corporation, 80 Broad Street, New York, New York. Kirlin, Campbell, Hickox, Keating & McGrann, Esqs., 120 Broadway, New York, New York. Harry I. Rosen, Esq.